IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 29/04/2004

Coram

The Honourable Mr. Justice K.P.SIVASUBRAMANIAM

Writ Petition No.4157 of 1996

M. Rajan Issac .. Petitioner

-Vs-

The Chairman & Managing Director,
Hindustan Teleprinters Ltd.,
Guindy, Madras - 600 032. .. Respondents

Petition filed under Article 226 of the Constitution of India
praying for the issue of a Writ of Certiorarified Mandamus as stated therein.

For petitioner: Mr. R. Gandhi, Senior Counsel
for M/s. R.G. Narendiran and
M. Baskar

For respondent: Mr. Sanjay Mohan
assisted by Mr. John
for M/s. Ramasubramaniam and Associates

:ORDER
The petitioner, who was working as Deputy General Manager (Management Services), was issued with a charge memo on 12.4.1991 and the articles of the charge memo are as follows:
"It is hereby alleged that Sri. M. Rajan Issac, while working as Dy.General Manager (Management Services), Hindustan Teleprinters Limited, Madras managed to remove from the Company premises, 15 novapan sheets; the said Sri. M. Rajan Issac also managed to purchase 1 (one) sheet of Novapan from M/s. N.K. Ahmed and Co.,. It is further alleged that the said Sri M. Rajan Issac created false documents using the Delivery Order No.L/9153 dt. 25.5.88 issued by M/s. N.K. Ahmed and Co., in respect of 1 Novapan sheet with an intention to cover up the removal of 15 sheets of Novapan done by him on an earlier occasion, and thereby caused a loss of Rs.20,914/- to the Company.

It is, therefore, alleged that the above acts committed by Sri Rajan Isaac constitute misconduct and violation of the following Rules of the Conduct, Discipline and Appeal Rules of the Company:

Rule 6 i) : Theft, fraud or dishonesty in connection with the business of

property of the Company or of property of another person within the premises of the Company.

v) : Acting in a manner prejudicial to the interest of the Company.

xx) : Commission of any act subversive of discipline or of good behaviour.

Xxxiii) : Breach of any provisions of the conduct Discipline and Appeal Rules.

2. After the petitioner had submitted his reply, not being satisfied with the same, the management held an enquiry and after the enquiry, the enquiry officer held that the charges were proved. The petitioner was directed to show cause against the findings of the enquiry officer and after

consideration of the petitioner's explanation, the disciplinary authority held that the charges were proved and the petitioner was removed from service. Hence the above Writ Petition seeking to quash the said order.

3. Mr. R. Gandhi, learned Senior Counsel had raised the following contentions:
(a) The entire action against the petitioner was motivated and without any basis. On 27.10.1989 itself, a set of charges viz., as many as 16 charges, inclusive of the charge which is the subject matter of the impugned charge memo dated 12.4.1991 viz., the alleged removal of 15 Novapan sheets from the Company premises were framed against the petitioner. Curiously the first memo was withdrawn belatedly by a memo dated 11.4.1991 and cancelled on technical grounds without prejudice to further action. On the very next day the impugned charge memo was issued. Cancellation of the charge memo was 18 months later. These facts would show that the petitioner was being unnecessarily persecuted.

(b) The nature of the charge and the evidence before the enquiry would reveal that there is absolutely no legal basis either for the charge or for the punishment meted out to the petitioner. Reference was also made to the explanation of the delinquent, the oral and documentary evidence and the conclusions of the enquiry officer; and the learned senior counsel contended that the charge was not made out and therefore, there was neither evidentiary nor legal basis for the charge.

(c) No second show cause notice had been issued by the disciplinary authority expressing agreement with the findings or proposing the penalty and hence the order of punishment shall be liable to be set aside.

(d) The Presenting Officer was a law graduate, a legally trained person and well trained on the legal side having conducted several such proceedings for the past twenty years and hence the petitioner made a request at the inception of the enquiry itself to have the assistance of a lawyer. The said request was, however, erroneously rejected on the ground that the Presenting Officer was not a lawyer. Hence, there was a gross violation of

principles of natural justice as the request for assistance of lawyer was unjustifiably denied by the management.

4. In support of the above contentions, the learned Senior Counsel relied upon a few judgments of the Supreme Court and I would deal with them subsequently.

5. Mr. Sanjay Mohan, learned counsel for the respondent contended that there was absolutely no basis for the allegation of lack of bona fides in the action taken against the petitioner. The only ground of delay in the cancellation of the first charge memo will not by itself lead to vitiating the entire proceedings and the charge, which has been substantiated, sustained, and held to be proved is a very serious charge of theft, mis-appropriation and causing loss to the management. The petitioner being an officer at the managerial level, was rightly terminated from service. The references to the evidence and the criticism of not making out a legal or even a moral basis for holding the petitioner guilty were unsustainable. Learned counsel contends that the evidence had been discussed in detail by the enquiry officer and it was clearly recorded that 15 Novapan Sheets which were removed on the directions of the petitioner were never brought back or replaced subsequently. It was also clearly established that the petitioner had indulged in manipulation of the records. In a departmental proceeding, what was required was only preponderance of probabilities and the said requirement has been satisfied amply in this case. The disciplinary authority has also considered the explanation of the petitioner in detail.

6. As regards the alleged failure to give show cause notice or of mentioning in the notice that the disciplinary authority was convinced about the guilt of the delinquent and that the notice amounted to pre-determination of the guilt of the delinquent and that it would vitiate the order of punishment etc., cannot at all be accepted.

7. With reference to the argument that the petitioner was not permitted to have the assistance of a lawyer, the learned counsel for the respondent contends that the rule applicable to the respondent does not require such a permission to be given and reliance was placed on rulings which accordingly to the learned counsel lay down that there is no fundamental right for allowing representation by a lawyer. The right of the delinquent would depend upon the rules in force and it was within the exclusive discretion of the management to give or to decline such a permission.

8. I have considered the submissions of both sides.

9. I would first consider the two objections viz., relating to the alleged violation of principles of natural justice namely that there was no proper second show cause notice and the notice which was given amounted to pre-determination by the disciplinary authority and secondly, the denial of the petitioner's request for the assistance by a lawyer.

10. As far as the first objection by the petitioner that show cause notice does not record the acceptance of the findings of the enquiry

report is concerned, I am unable to sustain the contention of the learned Senior Counsel for the petitioner. There is no dispute over the fact that a second show cause notice was issued and the petitioner was asked to forward his remarks on the enquiry report. As rightly contended by Mr. Sanjay Mohan, the essence of the judgments of the Supreme Court in Union of India and others vs. Mohd.Ramzan Khan [(1991) 1 SCC 588] and Managing Director, ECIL, Hyderabad and others vs. B. Karunakar and others [(1993) 4 SCC 727] is that the delinquent should have the opportunity to make his comments on the enquiry report if the enquiry officer and the disciplinary authority are different individuals. Therefore, his right is only to show cause against the conclusions of the enquiry officer and his objections should be taken into account by the disciplinary authority before he passes his final orders. There is no necessity for the disciplinary authority to state that he was fully convinced about the findings of the enquiry officer nor was there any necessity to indicate the punishment having regard to 42nd amendment to Article 311 of the Constitution.

11. The second limb of the learned Senior Counsel's objection is that the second show cause notice containing the expression that the Board after detailed discussion "agreed" with the findings that the petitioner was not " a fit person to continue in the service of the Company" would signify a pre-determined attitude or conclusion of the disciplinary authority and that such an approach really renders the show cause notice a farce. In fact, this submission of the learned Senior Counsel contradicts with the first limb of his objection viz., that the disciplinary authority should have sent the second show cause notice only after accepting the findings of the enquiry officer.

12. However, it is true that such observations in the second show cause notice really signifies a concluded mind-set of the disciplinary authority while he is supposed to keep his mind open till he hears the delinquent or goes through the objections/remarks of the delinquent on the enquiry report. Reliance was placed on some of the judgments in this context inclusive of mine holding that such a second show cause notice would be a farce and meaningless. The disciplinary authority not being the person who had conducted enquiry does not know anything about the demeanor of the witnesses in the enquiry nor the details of other evidence by both sides. Any conclusive opinion can be formed only after hearing the objections/remarks of the delinquent. That is the very basis on which the Supreme Court had held in the above mentioned two judgments that a copy of the enquiry report should be supplied along with the second show cause notice when the disciplinary authority and the enquiry officer are different. However, there appears to be some conflict of opinion and I do not propose to render any positive conclusion on this issue, considering that this Writ Petition deserves to be allowed on the other grounds as discussed below.

13. The further issue which is alleged to be in violation of principles of natural justice is that the petitioner was not allowed to have the assistance of a lawyer, even though it is alleged that the Presiding Officer was a legally trained person. The following facts are relevant for appreciating the said contention. In his communication dated 24.4.1991, which

was submitted prior to the enquiry, the petitioner has stated that he "should be permitted to avail the assistance of an advocate as has been the practice of the management and also that of several comparable public sector undertakings". There was no proper response to the request and he was not permitted to have the assistance by a lawyer. It is also pertinent to note that there was no denial of the positive contention of the petitioner that the usual practice of the management in such cases was to permit the delinquents to have the assistance of lawyer. Added to this, in the affidavit in support of the Writ Petition, the petitioner has contended as follows:

"6. However, the respondent by its letter dated 14.6.1991 chose to institute a disciplinary enquiry and the same was by Mr. C.N. Raman a retired Commissioner for departmental enquiries. In the said communication my request to be assisted by an Advocate made in my letter dated 24.4.1991, was turned down on the ground that the presenting officer of the Company was not one qualified in legal discipline. It would be pertinent to point out here that Mr. V. Ganapathy who was the Manager-Personnel and Administration and also holding the charge of Chief Vigilance Officer, had put in not less than 20 years of service as a Personnel man in several private sector undertakings before joining the respondent undertaking and the qualifications required for the recruitment of the Manager (P&A) included a degree in law also".

14. Strangely, in the counter filed by the respondent, there is absolutely no denial of the said contention that the Presenting Officer had put in more than 20 years of service in several private sector undertakings before joining the respondent and the qualifications for the appointment in the said capacity required a degree in law also. This positive contention goes undenied and in fact, I had adjourned the hearing to enable the counsel for the respondent to specifically deal with the said issue. However, no specific denial has been made and the learned counsel for the respondent has submitted only his legal contentions on the said issue viz., that the requirement to permit the assistance by a lawyer was within the exclusive discretion of the management and no such right can be claimed as long as the service regulation or the standing orders do not compel the management to permit the delinquents to have the assistance of a lawyer. Reliance was placed on the following judgments for the said proposition as discussed below. It will be useful to extract the rule position as below. Regulation 31(6) as it originally stood was to the effect that the employee may take the assistance of any other public servants but may not engage a legal practitioner for the enquiry. The rule has been subsequently amended and substituted as follows:
"Rule 31 (6):
The employee may take the assistance of any other public servant but may not engage a legal practitioner for the purpose.

However, the employee shall not take the assistance of any other public servant who has two pending disciplinary cases on hand in which he has to function as Defence Assistant.

The Disciplinary Authority may, at his discretion, permit the assistance of a legal practitioner to the employee where the case is presented on behalf of

the company by a Prosecuting Officer of the Central Bureau of Investigation or a Government Law Officer/Company's Law Officer".

15. The above rule envisages that where the case is presented by a Prosecuting Officer of the CBI or a Government Law Officer and Company's Law Officer, the disciplinary authority may permit the assistance of a legal practitioner to the employee. The question which arises for consideration is as to whether such a discretion is absolute and the enquiry officer can reject the request in an arbitrary manner when the Presenting officer was a legally trained person.

16. Reliance was placed on the following two judgments in support of the contention that in the absence of a provision under the relevant rules or standing orders, there was no right for the delinquent to be represented by somebody else.

1. Bharat Petroleum Corporation Ltd., vs. Maharashtra General Kamgar Union and others [(1999) 1 SCC 626].
2. Indian Overseas Bank vs. Indian Overseas Bank Officers' Association and another [(2001) 9 SCC 540].

17. There is no dispute over the position that in this case the service rules/standing orders enable the delinquent to seek such assistance and the extract as above of the regulation will show that the petitioner can have the assistance of a lawyer if the Presenting Officer is a law knowing person or even if he is a Prosecuting Officer of the CBI. More over, the above two judgments on facts deal with the demand to have the assistance of a co-employee/fellow workman and there was no demand for the assistance of a lawyer, the Presenting Officer being a legally trained person.

18. In Harinarayan Srivastav vs. United Commercial Bank and another [(1997) 4 SCC 384], relied upon by the learned counsel for the respondent, the demand for the assistance of a lawyer was dealt with, and the Presenting Officer was a law graduate. There is no discussion of the legal issue regarding the said right. The Supreme Court on facts found that the allegations in that particular case were very simple and not complicated and therefore, there was no violation of principles of natural justice.

19. Another judgment of the Supreme Court referred to by the learned counsel for the respondent is that of State of Rajasthan, Jaipur vs. S.K. Dutt Sharma [1993 Supp (4) SCC 61] dealing with a case where the Presenting Officer was a Deputy Superintendent of Police and it was held that it would not entitle the delinquent to be represented by a legal practitioner. This was apart from the specific finding on facts that the charges were not of such a nature as would require any assistance.

20. Reference is made to the decision of a Division Bench of Delhi High Court in Tagra S.L. vs. New India Assurance Co.Ltd., & Others [1 998 (II) LLJ 175], which is also of no help to the petitioner. The issue which arose for consideration was as to whether a rule which did not permit the engagement of a legal practitioner and vested the ultimate discretion with the management was violative of principles of natural justice and it was held in the negative.

21. A Division Bench of Kerala High Court in Saran vs.
Cochin Refineries Ltd. [1986 (II) LLJ 257] held that CBI Inspector cannot be deemed to be a legally trained person. Moreover, the delinquent was permitted to be represented by a Senior Officer in the enquiry.

22. None of the judgments cited by the learned counsel for the respondent as above is helpful to the petitioner. In contrast, in the following judgments, the need for assistance by a lawyer if the Presenting Officer is a law knowing person was considered in detail. The observations in The Board of Trustees of the Port of Bombay vs. Dilipkumar Raghavendranath Nadkarni and others(AIR 1983 SC 109) lay emphasis on the need to permit the delinquent to have the assistance of a lawyer when he is pitted against a legally trained and law knowing Presenting Officer and that it was necessary to ensure fair play in enquiry proceedings.
"12. Are we charting a new course? The answer is obviously in the negative. In C.L. Subramanian v. Collector of Customs, Cochin, (1972 3 SCR 485 : (AIR 1972 SC 2178) a Government employee requested the Enquiry Officer to permit him to appear through a legal practitioner and even though a trained public prosecutor was appointed as Presenting Officer, this request was turned down. When the matter reached this Court, it was held that the enquiry was in breach of the principles of natural justice. The order of domestic tribunal was sought to be sustained on the submission that sub rule (5) of Rule 15 of the Central Civil Services (Classification, Control and Appeal) Rules, 1957 lays that ".... The Government servant may present his case with the assistance of any Government servant approved by the Disciplinary Authority but may not engage a legal practitioner for the purpose unless the person nominated by the Disciplinary Authority as aforesaid is a legal practitioner or unless the Disciplinary Authority, having regard to the circumstances of the case, so permits." The submission was that it is a matter within the discretion of the Enquiry Officer whether to grant permission and more so because the relevant rule fetters the claim to appear through a legal practitioner. Negativing this contention this Court held that the fact that the case against the appellant was being handled by a trained prosecutor was by itself a good ground for allowing the appellant to engage a legal practitioner to defend him lest the scales should be weighted against him. This conclusion was recorded after reference to the earlier decisions in Brooke Bond India (Pvt.)Ltd v. S. Subba Ramman, (1961) 2 Lab LJ 417 and Dunlop Rubber Co. v. Workmen (AIR 1965 SC 1392). Reference was made to Pett's case (1968) 2 All ER 545, referred to earlier, but it is observed that this case has not commended itself to this Court. The earlier cases of this Court were distinguished. In our view, we have reached a stage in our onward march to fair play in action that where in an enquiry before a domestic tribunal the delinquent officer is pitted against a legally trained mind, if he seeks permission to appear through a legal practitioner the refusal to grant this request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated. This view has been taken by a learned single Judge and while dismissing the appeal in limine approved by the Division Bench of the High Court commends to us. Therefore, this appeal is liable to be dismissed."

23. In J.K. Aggarwal vs Haryana Seeds Development

Corporation Ltd and others [AIR 1991 SC 1221], it was held that where the delinquent was pitted against a Presenting Officer being a person of legal mind and expert, it was held that the refusal of assistance by lawyer to the delinquent would be improper.

24. In Director, BCG Vaccine Laboratory, Madras VS. S. Pandian and others [1996 LLJ (II) 634], after referring to the judgment of Supreme Court in AIR 1983 SC 109 cited above, the Supreme Court considered the issue as to whether the management should be directed to pay remuneration to the advocate who was engaged by the delinquent. The Supreme Court directed payment of remuneration to the advocate who was engaged by the delinquent. Such is the importance given to the right of the delinquent to have the assistance of a lawyer if the Presenting Officer was a legally trained or a law knowing person.

25. As there is no denial of the contention of the petitioner that the Presenting Officer was a law graduate and having experience of 20 years as Personnel Officer, refusal to the delinquent to have the assistance of a lawyer would vitiate the enquiry proceedings. Regulation 31(6) as extracted above clearly obligates the management to grant such a permission to the delinquent and the discretion vested on the management cannot be arbitrarily exercised at the convenient choice of the disciplinary authority. The expression "may at his discretion" has to be read as "shall" when the Presenting Officer is a legally trained person. Therefore, I am inclined to hold that the enquiry proceedings have to be held as vitiated. The contention by the management that the Presenting Officer was not a "Lawyer", is not at all sufficient. The Prosecuting Officer need not be a lawyer so as to entitle the delinquet to have the assistance of a lawyer. It is enough if the Presenting Officer is a law graduate, or a legally trained person with experience on the legal aspects of the enquiry. That is the reason why the Regulation itself mentions about a Prosecuting Officer of the CBI or the Company's law officer. Therefore, he need not be a practising lawyer to enable the employee to invoke the said provision.

26. I am also unable to agree with the contention of the learned counsel for the respondent that the nature of the charges do not require assistance of a lawyer. The nature of the charges are very serious inclusive of theft, fraud or misappropriation and committing an act of subversive of discipline and of good behaviour and causing loss to the employer. One of the charges also relate to a general charge of violation of the provisions of the conduct, discipline and appeal rules without mentioning any specific provision. A perusal of the proceedings also disclose that a proper cross-examination was necessary and also the need to adduce proper evidence by the defence. The discussion of the evidence by the enquiry officer as well as the impugned order dated 18.3.1992 of the disciplinary authority disclose that the issues thus raised have to be properly defended by them on factual and legal aspects and the charges are criminal in nature. Thus, it cannot be contended that the nature of charges do not warrant the assistance of a lawyer. Finding the delinquent guilty of theft in a departmental proceeding will have positive result of damaging his reputation in the society and thus the delinquent cannot be deprived of his right to have

a proper legal assistance.

27. One other reason which weighs with me to hold that the enquiry has to be conducted again is that the enquiry officer has not given due regard to certain features of the defence which are very vital. As the enquiry has to be conducted again and the enquiry officer must have a very free and independent mind, I would only point out one particular feature which reflect on the very nature of the charges and whether the charge as framed could be held to have been proved.

28. It may be borne in mind that the charge of theft is very serious one in nature. It is true that in terms of the judgments of the Supreme Court, even though a charge under a departmental proceeding cannot be required to be proved as in a criminal proceeding, the preponderance of probabilities would be sufficient in a departmental proceeding. At the same time, it is equally well settled that if the nature of the charge is a very serious one and criminal in nature and which would result in a grave stigma to the delinquent, the management should make out a strong case, if not by proof beyond reasonable doubt, at least strong enough evidence to show that any other conclusion could not be reasonably arrived at. The crux of the charge is that 15 Novapan Sheets were removed from the Company premises and were never replaced again. The defence by the petitioner is manifold inclusive of the contention that the materials have been replaced and that they were very much available within the premises. He would contend that a diligent verification of the stores in the second floor of the Research and Development Building would reveal that the materials referred to in the charge sheet are physically available and therefore, the charge was baseless and mala fide. In this context, the following observation in the enquiry report is very relevant.

"PW-6 deposed that recently he checked and found 10 pieces of Novapan Sehets of 2ft X 2ft white in colour in one of the Stores of R&D. But, during his investigation, he found only one Novapan Sheet received and used."

Having stated so, there is no further discussion on the out come of the said positive evidence that 10 pieces were very much available in the stores. It cannot be disputed that the premises is subjected to strict checking at the entry and 10 Novapan Sheets could not have been brought inside without having been noticed at the entrance. Therefore, it would be illogical to conclude as the enquiry officer has found, that it was clearly established that 15 Novapan Sheets did not come back to the factory and that therefore, it was established that there was a loss of Rs.19,278/- and the delinquent was responsible for it. A further issue which has to be borne in mind is that even according to the management 15 Novapan Sheets were only removed and sent to M/s. N.K. Ahmed and Co.,. There is no independent evidence as regards what happened at the end of M/s. N.K. Ahmed and Co. It may establish negligence on the part of the delinquent in not having either obtained a replacement of the Novapan Sheets or in not having recovered the cost of the said sheets from N.K. Ahmed. It cannot certainly make out charges of theft and fraud on the part of the delinquent, unless evidence is made available to show that the delinquent had taken either the materials or the value of the materials from M/s. N.K. Ahmed which is admittedly a concern supplying materials to the respondent.

29. The above are only some of the factual issues passing in my mind and the ultimate conclusion has to depend on a proper enquiry to be conducted afresh. I am not inclined to go further into the issue as to what should be the finding and whether the available evidence would be sufficient to sustain the charges or whether a part of the charges could be held to have been established and whether such findings would have impact on the quantum of punishment etc.,. It is entirely a matter for the respondent to re-appraise the evidence to be adduced in the enquiry which has to be conducted afresh. This Court is also unable to ignore some of the facts relating to the back ground of the enquiry against the petitioner. The petitioner was suspended from 8.9.1989 by a Charge memo dated 20.7.1989. The petitioner is charged with as many as 16 allegations against him. After the delinquent submits his reply, nothing further happened till 11.4.1991 when the charge memo is cancelled and on the very next day, the impugned charge memo dated 12.4.1991 is issued reiterating only one of the 16 charges.

30. In the said back ground, the question as to whether the petitioner was being unnecessarily persecuted for any reason also requires to be considered. I presume that the upper strata of the management of the respondent would have by now changed by different personnels. Fresh enquiry would facilitate fair approach with open mind and remove such apprehension from the mind of the delinquent.

31. With the result, the Writ Petition is allowed and the dismissal order of the respondent is set aside subject to the liberty of the respondent to proceed afresh in accordance with law and subject to the above observations. However, considering the seriousness of the allegations, if in the event of the management contemplating any fresh enquiry, there is no need to reinstate the petitioner in service. The respondent would be entitled to continue the petitioner under suspension and as regards back wages, it would depend upon the ultimate out come of the enquiry. There will be no order as to costs.

29.4.2004
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